

# Exhibit 1

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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK (BROOKLYN)

SUSANNA MIRKIN, individually  
and on behalf of all others  
similarly situated, et al,

Plaintiffs,

v.

XOOM ENERGY, LLC, et al,

Defendants.

Case No. 1:18-cv-02949-ARR-RER

Brooklyn, New York  
October 17, 2023

TRANSCRIPT OF PRE-MOTION HEARING  
BEFORE THE HONORABLE RAMON E. REYES, JR.  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

For the Plaintiffs:

Steven L. Wittels, Esq.  
James Burkett McInturff, III,  
Esq.  
Wittels McInturff Palikovic  
18 Half Mile Road  
Armonk, NY 10504

Ethan Roman, Esq.  
Wittels McInturff Palikovic  
305 Broadway  
Ste Floor 7  
New York, NY 10007

For the Defendant:

Michael D. "Matt" Matthews, Jr.,  
Esq.  
David Villarreal, Esq.  
Diane S. Wizig, Esq.  
McDowell Hetherington, LLP  
1001 Fannin Street  
Suite 2400  
Houston, TX 77002

Federal Defender's Office  
271 Cadman Plaza East  
Brooklyn, NY 11201

Clerk:

M.V.

1 Court Recorder: Electronic Sound Recording  
2 Transcription Service: Chris Hwang  
3 Abba Reporting  
4 PO Box 223282  
Chantilly, Virginia 20153  
(518) 302-6772

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24 Proceedings recorded by electronic sound recording;  
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1 (Call to order)

2 THE COURT: Good afternoon, this is Magistrate Judge  
3 Reyes. We're holding a pre-motion conference by telephone in  
4 Mirkin v. XOOM, docket number 18-CV-2949.

5 Who's on for the Plaintiffs?

6 MR. WITTELS: Good afternoon, Your Honor, Steven  
7 Wittels, together with Burkett McInturff and Ethan Roman. Good  
8 afternoon.

9 THE COURT: Who's on for XOOM?

10 MR. MATTHEWS: Hi, Your Honor, this is Matt Matthews  
11 for XOOM. And also with me are Diane Wizig and David  
12 Villarreal.

13 THE COURT: Okay, so XOOM wants to make a motion to  
14 stay pending (indiscernible) of Ross' general class  
15 certification, yeah?

16 MR. MATTHEWS: Yes, Your Honor.

17 THE COURT: Hi bar, yes?

18 MR. MATTHEWS: It is. There are a number of cases  
19 that are cited in Plaintiff's brief in a footnote where  
20 district courts have denied motions to stay, but you know, we -  
21 - this case is different, presents different circumstances than  
22 those cases, which didn't identify any important legal issue  
23 that would have given the 2nd Circuit a reason to take up the  
24 case under Sumitomo and all of those cases where just subject  
25 to abuse of discretion was just -- if taken up by the Court

1 would be subject to *de novo* review.

2 There -- some of those cases that Plaintiff cites are  
3 even more extraordinary where, one, the trial date had already  
4 been set three months later. The notice had already issued.

5 In another, the plaintiffs had said they were going  
6 to pursue the individual claim regardless of the outcome of  
7 23(f).

8 And in another, the Rolopark (phonetic) case, the 2nd  
9 Circuit had previously denied three other 23(f) petitions from  
10 RBS in companion cases.

11 So I think the -- I'm happy to go through some of the  
12 arguments from our 23(f) petition if you like, but we believe  
13 that this case does present some different issues than those  
14 did.

15 And that XOOM has certainly presented what, you know,  
16 the Court would refer to as serious questions about the merits  
17 of this decision, satisfies the first factor, the likelihood of  
18 success on the merits. And --

19 THE COURT: Have you identified any cases where a  
20 23(f) stay has been granted a district court order or by the  
21 circuit?

22 MR. MATTHEWS: Yes, Your Honor. They're just older  
23 than Plaintiff cases. That was the point Plaintiff was making  
24 was that not that it never happens, but our cases are older  
25 than theirs.

1 THE COURT: I want to understand your argument of  
2 common proof.

3 MR. MATTHEWS: Sure.

4 THE COURT: Alleged 5600 or whatever the number is  
5 mini trials that will have to take place?

6 MR. MATTHEWS: Yes, Your Honor.

7 THE COURT: Is it that the proof with respect to  
8 individual rate determinations is not common or proof I guess  
9 between the rate determination not common?

10 MR. MATTHEWS: Both. So I'm happy to provide a  
11 little bit more explanation on that. So the -- our argument,  
12 contrary to what Plaintiffs have argued, is not a challenge to  
13 the Court's summary judgment contract interpretation.

14 I mean, we -- to be clear, we disagree with it, but  
15 that's not -- the 23(f) petition is explicitly based on the  
16 Court's contract interpretation of summary judgment. It  
17 explicitly assumes that construction.

18 And the Court's construction at summary judgment was  
19 that XOOM's contract required that variable rates be determined  
20 by XOOM's actual and estimated supply costs, each month, each  
21 rate.

22 That is not an interpretation that either of the  
23 parties put forward. So the consequence of that interpretation  
24 isn't something that the parties briefed in class -- in the  
25 class cert. briefs.

1           So the -- that record I think and those arguments as  
2           to what they contract interpretation would require at the trial  
3           wasn't fully developed in the class cert. briefing.

4           But what it would require at trial if the contract  
5           and the Court found at summary judgment that there are fact  
6           questions about whether or not XOOM determined this rate based  
7           on supply costs, not just considered them, but determined those  
8           rates based on that, that means that each month, and there are  
9           so far 129 months and counting in the class period, that there  
10          will have to be a consideration of what XOOM did to set those  
11          rates.

12          In New York, there are 40 different rates that were  
13          set each month in the different utilities zones and different  
14          pricing plans. And there's, not contrary to Plaintiff's  
15          assertion, that process was not uniform.

16          Each month, XOOM started with a spreadsheet that  
17          included an estimate of rates, but what follows from that was a  
18          series each month this happened a series of many meetings  
19          between different individuals about market considerations,  
20          different, you know, weather, different prior periods, whether  
21          costs had been higher or lower during those prior periods. And  
22          the contract, as Your Honor probably knows, allowed XOOM to  
23          include prior period adjustments in its rates.

24          There is evidence, both documentary and testimonial  
25          evidence, that XOOM did consider prior period adjustments in

1 those rates, but they were not reflected in those spreadsheets.  
2 Because they're not reflected in those spreadsheets, that means  
3 that they will have to be considered through testimonial  
4 evidence and other evidence like emails.

5 I'll give you an example. In early 2014, Plaintiff  
6 submitted this evidence in support of their summary judgment  
7 argument.

8 There are emails reflecting that XOOM made  
9 adjustments to its variable rates based on losses that it  
10 incurred due to the polar vortex. That happened at the  
11 beginning of 2014.

12 Now that's a very specific consideration that only  
13 applied during that limited time period. There's no allegation  
14 that XOOM for the 128 months that followed was factoring in  
15 polar vortex pricing impacts into its variable rates.

16 So those sorts of considerations are going to have to  
17 take place for each month in the class period for each of the  
18 XOOM utility zones in New York, which as I said, it's 40  
19 different rates.

20 The Plaintiff does not have any uniform proof to make  
21 that showing. It's going to be a month by month, rate by rate  
22 consideration based on testimonial evidence and a variety of  
23 documents.

24 THE COURT: But the question that I had asked  
25 originally was whether the -- a particular month rate



1 determination subject to common proof.

2 And I think whether it's different than the next  
3 month's proof or the months after that, each individual month  
4 is subject to common proof, whether it's testimony, emails,  
5 spreadsheets. You know, all of that evidence applies to that  
6 month's rate determination (indiscernible).

7 MR. MATTHEWS: Well, not necessarily.

8 THE COURT: Oh.

9 MR. MATTHEWS: Not necessarily because there are 40  
10 different rates each month that are set in New York. So the  
11 rates that set in the Niagara utility zone is different from  
12 that that's set in Con Ed. The electricity rates in upstate  
13 New York vary in ways that are different from those that would  
14 be in the City.

15 THE COURT: And they set the rates differently for  
16 each of those -- the 40 different zones?

17 MR. MATTHEWS: Correct.

18 THE COURT: But looking at Niagara, Month 1, that's  
19 subject to the same proof throughout, you know, so every class  
20 member that had -- that's for that zone, same proof, right?

21 MR. MATTHEWS: I guess my point is that there are 40  
22 different zones. So for a customer in any particular utility  
23 zone, the rate will be the same for the group of customers that  
24 are on the same plan in that same utility zone.

25 But there will be 40 different considerations each

1 month. And there are 128 or 29 at this point months in the  
2 class period.

3 THE COURT: All right, continue. Are there any other  
4 issues you want to raise?

5 MR. MATTHEWS: I'm sorry, Your Honor, I didn't catch  
6 that last part?

7 THE COURT: No, go ahead, go ahead. I cut you off.  
8 You were telling me why you should be making this motion. Go  
9 ahead.

10 MR. MATTHEWS: Oh, okay, sure, anything else on the  
11 individualized month to month considerations?

12 THE COURT: No, I'm not sure I agree with you on the  
13 ultimate point, but I don't need any more information now.

14 MR. MATTHEWS: Okay, well, I guess just to sum up in  
15 case I haven't been clear about that issue, it's within a  
16 utility zone in a month, there would be common proof for the  
17 customers within that utility zone for that month.

18 But the issue is that there are 40 different rates  
19 across a variety of utility zones and there's not common proof  
20 to show that in any one month.

21 And the evidence from month to month is also  
22 individualized. There's not common proof month to month about  
23 how XOOM sets the rates.

24 That's, again as I said, not something that the  
25 parties briefed because the Court's contract interpretation was

1 somewhat different than the parties argued.

2 And the Court, because it has found now that there  
3 are fact questions about how XOOM determines its rate, that  
4 determination's left for trial and it will require, as we said,  
5 those individualized considerations within a month and from  
6 month to month.

7 And that's where the 5,600 is the 40 times 128. And  
8 I guess I would also point out there -- it's not just the same  
9 product in each month. It's not just the, you know, we have 40  
10 different electricity utilities.

11 The class that's been certified includes gas as well.  
12 So the gas considerations are different than those that apply  
13 for electricity. And the supply costs that factor into that  
14 price were different than the supply costs that factor into the  
15 electricity rates.

16 THE COURT: All right, anything else you need to let  
17 me know?

18 MR. MATTHEWS: Not on that issue. That's one of the  
19 issues addressed in the 23(f) appeal. The other is our  
20 contention that the Court applied a -- the wrong legal standard  
21 by assuming a preference for class certification.

22 That, we believe, makes this appeal subject to *de*  
23 *novo* review and all those 23(f) considerations I just went  
24 through subject to a *de novo* review rather than abuse of  
25 discretion.

1 With respect to any sort of negative impact on the  
2 class, the class' contract claim, you know, we'll continue to  
3 include pre-judgment interest if the case is stayed.

4 There's also, you know, as the case -- many cases  
5 including some of Plaintiffs' cases recognize, there can be  
6 potential confusion created if a notice goes out to the class  
7 members, and then, the class decision is vacated or withdrawn.

8 The case -- there -- Plaintiffs' cases say that's not  
9 a risk here because the Defendant hasn't pointed out any reason  
10 why the class decision should be reversed, but I would, you  
11 know, argue that we have done that here, so that that  
12 consideration is a more meaningful one.

13 That you know, the other factor's judicial economy is  
14 a public interest factor consideration. And the harm to XOOM  
15 from moving forward to prepare for, again, I said would be a  
16 host of many trials covering 10 plus years involving, you know,  
17 not just XOOM employees, but XOOM's efforts to find former  
18 employees who were involved in those pricing decisions years  
19 and years ago since that testimony will be key at trial.

20 THE COURT: Mr. Wittels, do you want to respond or  
21 someone else?

22 MR. WITTELS: Your Honor, thanks. If Mr. McInturff  
23 would take the lead on that, if that's okay?

24 MR. MCINTURFF: Sure. Good afternoon, Your Honor,  
25 this is Burkett McInturff on behalf of the Plaintiffs in the

1 class.

2 Just to respond briefly, this -- the Defendant's  
3 application really runs head long into Judge Deary's well-  
4 reasoned opinion in Price that, you know, we're aware Your  
5 Honor's assigned to that case.

6 They -- in terms of likelihood of success on the  
7 merits, with all due respect to my adversary, the theory that  
8 is at issue in this case was briefed to the District Court.

9 Judge Ross considered our theory. She considered our  
10 damages model. She endorsed it. She found that the central  
11 issue in the case is whether or not the Defendants' rate  
12 setting process unfolded in the way that XOOM claims it  
13 unfolds.

14 Critically, it's Plaintiffs' position that the  
15 documentary evidence that was produced in the case, as well as  
16 testimony, doesn't support that. That in fact, the rate  
17 setting process deviated substantially from the contract terms.

18 You know, most critically, the contract was  
19 ultimately amended several years down the line to incorporate  
20 its pricing strategies.

21 And at deposition, XOOM's witnesses admitted that  
22 they actually never changed their conduct. They just updated  
23 the contract to make it more reflective of what they've been  
24 doing all along.

25 Judge Ross understood that the challenge to XOOM's

1 pricing practices is a uniform challenge. The Defendant raised  
2 the 5,600 trials issue at class certification. That was  
3 considered and rejected by Judge Ross. That's as to prong 1 of  
4 the merits.

5 And as, excuse me, as Judge Deary noted in the Price  
6 v. Progressive, that requires in order to satisfy that prong,  
7 it requires a substantial showing that the district court's  
8 decision is questionable.

9 XOOM has not done that. They've not even come close  
10 to doing that. In fact, this type of action is well  
11 established. It's a breach of a form contract case against an  
12 independent energy company.

13 There's at least four other class certification  
14 rulings finding in favor, certifying the class on the exact  
15 same claims, requiring the exact same type of factual analysis.

16 In fact, it wasn't cited in our letter, but there was  
17 a decision denying class cert. in the District of Pennsylvania  
18 that went up to the 3rd Circuit.

19 And the 3rd Circuit reversed the denial of the class  
20 certification because it's -- we're fundamentally interpreting  
21 a form contract that is given to consumers without their  
22 ability to negotiate it, where this is a -- cases like these  
23 raise questions of uniform conduct.

24 So XOOM has not come close to making the substantial  
25 showing that the District Court's decision is questionable.

1 Again, that's why in the last 10 years, we haven't been able to  
2 locate a single case that stayed a -- that stayed the  
3 underlying district court case while there was a Rule 23(f)  
4 petition pending.

5 XOOM cited the, if I'm pronouncing it right, Petrobas  
6 case that was stayed. That was actually stayed by the 2nd  
7 Circuit. So it's just incredibly rare that the district courts  
8 will stay a case following a class certification ruling.

9 Here, in particular, I mean, the -- Judge Ross' class  
10 certification ruling came just two weeks after a summary  
11 judgment ruling.

12 We've now -- the Court as we put in our paper -- in  
13 our papers, the Court had the benefit of hundreds and hundreds  
14 of pages of briefing and evidence and was well within its  
15 discretion to certify the class.

16 Concerning the other category of whether XOOM's  
17 appeal raises a developing area of law that is critical to the  
18 development of the law class actions, as Judge Deary noted in  
19 Price, even -- and this is quoting Sumitomo at 262 F.3d at 140,  
20 even "a novel legal question will not compel immediate review  
21 unless it is of fundamental importance to the development of  
22 the law of class actions."

23 The Defendants have raised an issue about whether or  
24 not Judge Ross applied the wrong standard, but as set forth in  
25 our response to their 23(f) petition, they show no proof that

1 this actually occurred. They take a couple of snippets out of  
2 context and ignore the Court's well-reasoned opinion. So we  
3 don't think that there's really any hope on the merits of the  
4 23(f) petition.

5 And as for the other prongs, irreparable injury, harm  
6 to the Plaintiffs and the public interest, the Price decision  
7 is directly on point. XOOM shows that it is -- that all three  
8 of those criteria do not favor XOOM. They, in fact, favor  
9 Plaintiffs.

10 And I will note that we were able to work out a -- an  
11 agreeable class notice program. You know, the Defendants  
12 aren't objecting to the notice program.

13 And so, we think that the correct path forward is for  
14 Your Honor to deny any stay application, enter the order, which  
15 is not objected to other than for the stay, and to allow us to  
16 move this case forward to the notice process.

17 THE COURT: While I'm skeptical where a stay is  
18 appropriate here, I'll let XOOM make its motion.

19 MR. MATTHEWS: Thank you, Your Honor.

20 THE COURT: How many time do you need?

21 MR. MATTHEWS: I'll do my best to change your mind.

22 THE COURT: How much time do you need?

23 MR. MATTHEWS: May we have until November the 3rd?

24 THE COURT: That's fine.

25 Mr. McInturff, how much time do you need to oppose?



1 MR. MATTHEWS: I'm also happy to, you know,  
2 self-impose some page limits on the briefing to, you know,  
3 we've already submitted a whole lot of briefing to the Court on  
4 a variety of issues. I think, you know, 10 or 15 pages is all  
5 we need. If, you know, for brief response and then, you know,  
6 a reply of five pages.

7 THE COURT: That's fine. November 3rd for the  
8 motion.

9 MR. MCINTURFF: I think --

10 THE COURT: How much time do you need to oppose?

11 MR. MCINTURFF: Two weeks on the 17th?

12 THE COURT: Okay.

13 MR. MATTHEWS: With -- Your Honor, with Thanksgiving  
14 following that next period, can we have until December the 1st  
15 to reply?

16 THE COURT: And the page limits, 15 pages for the  
17 motion and opposition and five pages for the reply.

18 MR. MATTHEWS: Thank you, Your Honor.

19 MR. MCINTURFF: Your Honor, I apologize. I didn't  
20 hear. Did you say 15 for the opposition?

21 THE COURT: Yeah, do you need more than that?

22 MR. MCINTURFF: No, no, I just couldn't -- there was  
23 a -- I think someone was clearing her throat so I just couldn't  
24 hear you.

25 THE COURT: That was me, sorry, got a little cough.

1 All right, okay, anything else?

2 MR. MCINTURFF: Well, Your Honor, we do have the  
3 application for the notice plan that was ordered by Judge Ross  
4 that we submitted.

5 Plaintiffs would ask that notwithstanding the  
6 Defendants' request to brief the stay, that we go ahead and get  
7 that so ordered and going because it's not -- notice wouldn't  
8 have -- will not have gone out by the time the briefing is  
9 concluded on the stay motion. So, that way, at least, we're  
10 not losing time while there's briefing.

11 MR. MATTHEWS: Your Honor, this is Matt Matthews for  
12 XOOM. I think with the short briefing schedule that we've laid  
13 out, I would ask that the Court consider the stay motion before  
14 moving forward with the notice plan. That's the whole point of  
15 our request for a stay.

16 MR. MCINTURFF: Sorry, I should clarify. I mean, we  
17 could hold notice itself in abeyance, but we don't need to wait  
18 -- await the production of the class list or getting the  
19 administrator going and the, you know, and the website getting  
20 up and all of the -- or getting ready to go. We don't need --  
21 you know, we built in the notice order that we submitted to  
22 Your Honor wouldn't have notice going out for at least 60 days  
23 from now.

24 So there's quite a bit of work in the interim that  
25 needs to occur. And we could certainly get that work going

1 pending any ruling on a stay request.

2 THE COURT: And the only --

3 MR. MCINTURFF: That --

4 THE COURT: The only work during that period of time  
5 for XOOM is producing the class list?

6 MR. MCINTURFF: That's -- that and, you know, some  
7 minor approval, you know, making sure that there's no objection  
8 to the website and finalized forms of notice, but that's not  
9 material.

10 MR. MATTHEWS: That's right, Your Honor. I mean,  
11 again, we would -- trying to kind of put a hold on additional  
12 work. That's the heart of the stay request.

13 THE COURT: (Indiscernible.)

14 MR. MATTHEWS: It's producing the class list and  
15 taking a look at website for approval is what would be  
16 required.

17 THE COURT: Minimal. All right, I'll approve the --  
18 I'll approve that motion. Number is it -- it's number 156 on  
19 the docket if I'm not --

20 MR. MCINTURFF: That is correct. And there's a  
21 proposed order that is 156-1.

22 THE COURT: Yeah, okay. I'll take care of that  
23 offline. All right, that's it?

24 MR. MATTHEWS: That's it from XOOM, Your Honor.

25 Thank you.

1 THE COURT: Okay.

2 MR. MCINTURFF: That's it from Plaintiff.

3 THE COURT: Thank you, folks. Take care.

4 MR. MCINTURFF: Thank you, Your Honor.

5 MR. MATTHEWS: Oh, Your Honor?

6 THE COURT: Yes.

7 MR. MATTHEWS: I'm sorry, one clarification. The  
8 website would not go live until after the Court rules on the  
9 stay order, correct?

10 I think the notice proposal that Plaintiff has  
11 submitted would have the website going live. Mr. McInturff's  
12 correct that the notices wouldn't go out until the stay issue  
13 is dealt with, but I think under the submitted order, the  
14 website would go live.

15 MR. MCINTURFF: We would agree to keep it in the  
16 background. The only reason the website goes live a few days  
17 before notice is issued is so that Google has a chance to crawl  
18 it, an index that says that it's searchable.

19 So we can -- we would hold that -- we would hold the  
20 website in abeyance and then, you know, assuming the stay  
21 motion is denied, we would sort of pick up from that point.

22 THE COURT: Okay.

23 MR. MATTHEWS: Understood. So the website and the  
24 notice would be held until the Court rules on the stay.

25 THE COURT: Yes.

1 MR. MATTHEWS: Thank --

2 MR. MCINTURFF: But we'll just to be clear, we'll get  
3 it ready like we'll get the notice. So we'll work to get the  
4 website ready to go and resolve any issues, so that assuming  
5 the Court denies the stay, we'll then we'd be able to proceed,  
6 you know, at deliberate speed.

7 THE COURT: Okay.

8 MR. MATTHEWS: Understood.

9 THE COURT: All right, thank you.

10 MR. MATTHEWS: Thank you.

11 MR. MCINTURFF: Thank you, Your Honor.

12 MR. WITTELS: Thank you.

13 (Proceedings concluded)

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**CERTIFICATE**

I, Chris Hwang, court approved transcriber, certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter.

*CH*

November 1, 2023

Chris Hwang

Date

Court Reporter